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R. v. Germanis

Between
Her Majesty the Queen, and
William Germanis

[2001] O.J. No. 2935

Ontario Court of Justice
Newmarket, Ontario
Lampkin J.

Oral judgment: January 18, 2001.
(35 paras.)

Statutes and Regulations Cited:

Canadian Charter of Rights and Freedoms, being Part I, of Schedule B of the Canada Act 1982, c. 11 (U.K.), section 1, paragraph 10(b).
Highway Traffic Act, R.S.O. 1990, c. H-8, subsections 48(1), 48.1(2) and (6).
O. Reg. 340/94, subsection 6(1), promulgated under the Highway Traffic Act, R.S.O. 1990, c. H-8.

Cases Cited:

R. v. Milne (1996), 28 O.R. (3d) 577, 90 O.A.C. 348, 107 C.C.C. (3d) 118, 48 C.R. (4th) 182, 18 M.V.R. (3d) 161, [1996] O.J. No. 1728 (Ont. C.A.).
R. v. Talbourdet (1984), 32 Sask. R. 5, [1984] 3 W.W.R. 525, 9 D.L.R. (4th) 406, 8 C.R.R. 82, 12 C.C.C. (3d) 173, 39 C.R. (3d) 210, 27 M.V.R. 46 (Sask. C.A.).
R. v. Therens (1983), 23 Sask. R. 81, [1983] 4 W.W.R. 385, 148 D.L.R. (3d) 672, 5 C.R.R. 157, 5 C.C.C. (3d) 409, 33 C.R. (3d) 204, 20 M.V.R. 8 (Sask. C.A.); affirmed at [1985] 1 S.C.R. 613, 59 N.R. 122, 40 Sask. R. 122, 38 Alta. L.R. (2d) 99, [1985] 4 W.W.R. 286, 18 D.L.R. (4th) 655, 13 C.R.R. 193, 18 C.C.C. (3d) 481, 45 C.R. (3d) 97, 32 M.V.R. 153, [1985] S.C.J. No. 30.

Counsel:

Mark A.J. McDonnell, for the Crown.
M. Higgins, for the defendant.

¶ 1 **LAMPKIN J.** (orally):— In this appeal, the appellant raises the issue that the evidence of the police officer with respect to the presence of alcohol in the blood of the appellant after he had been stopped and

tested on the roadside screening device, ought not to be accepted into evidence because of breach of paragraph 10(b) of the Canadian Charter of Rights and Freedoms, being Part I, of Schedule B of the Canada Act 1982, c. 11 (U.K.).

¶ 2 The appellant was charged with a number of offences, one of them being that, on the 6th day of May in the year 2000 at 2:56 a.m. at Steeles Avenue in the Town-of Markham, he committed the offence of class G-2 licence holder drive with blood-alcohol level above zero, contrary to subsection 6(1) of the Ontario Regulation 340/94, promulgated under the Highway Traffic Act, R.S.O. 1990, c. H-8.

¶ 3 In the course of the evidence, the officer testified that, having stopped the appellant and having noted the smell of an alcoholic beverage on his breath, he made a demand for a sample of breath into a roadside-screening device. This demand was made pursuant to section 254 of the Criminal Code, R.S.C. 1985, c. C-46. It is also clear, however, that pursuant to subsection 48(1) of the Highway Traffic Act, the officer had the right to make a similar demand.

¶ 4 After a number of attempts, a satisfactory sample was provided and the device read an "A" which indicated a blood-alcohol concentration of between 0.5 milligrams of alcohol per 100 millilitres of blood and 99 milligrams of alcohol in 100 millilitres of blood. On that basis, the officer issued a 12-hour driver licence suspension as well as an offence notice for G-2 violation for having a blood-alcohol above zero.

¶ 5 At the trial, the agent who represented the appellant attempted to raise the paragraph 10(b) argument, and I am not sure whether it was allowed or disallowed or even allowed to be argued. But in any event, it is now raised today.

¶ 6 Mr. Higgins, on behalf of the appellant, relies on a number of authorities including R. v. Milne (1996), 28 O.R. (3d) 577, 90 O.A.C. 348, 107 C.C.C. (3d) 118, 48 C.R. (4th) 182, 18 M.V.R. (3d) 161, [1996] O.J. No. 1728 (Ont. C.A.), and R. v. Therens (1983), 23 Sask. R. 81, [1983] 4 W.W.R. 385, 148 D.L.R. (3d) 672, 5 C.R.R. 157, 5 C.C.C. (3d) 409, 33 C.R. (3d) 204, 20 M.V.R. 8 (Sask. C.A.); affirmed at [1985] 1 S.C.R. 613, 59 N.R. 122, 40 Sask. R. 122, 38 Alta. L.R. (2d) 99, [1985] 4 W.W.R. 286, 18 D.L.R. (4th) 655, 13 C.R.R. 193, 18 C.C.C. (3d) 481, 45 C.R. (3d) 97, 32 M.V.R. 153, [1985] S.C.J. No. 30. The roadside tests are merely investigative tools and, if the evidence gathered on a roadside testing device is to be used to charge the appellant or a G-2 driver in the circumstances of this case, then he must be given his right to counsel after the test has been completed.

¶ 7 It is clear from all of the jurisprudence that, when an officer stops a person who is in charge of a motor vehicle on the public streets, the person is detained. The mere stopping by an officer - a person in authority - of a motorist, connotes a form of detention, because you run the risk of certain offences being laid against you if you fail to obey an officer.

¶ 8 However, the Supreme Court of Canada has determined in R. v. Therens and other matters, that it is a reasonable limit under section 1 of the Charter for officers to be able to regulate drivers in such a fashion as to stop them. And in particular, having stopped them and having formed a suspicion that they may have alcohol in their blood, to make a demand for a roadside-screening test without providing them with the right to counsel - that is the reasonable limit.

¶ 9 If the roadside test reveals however, that the person has failed the test - which means that he is over 80 - it gives him reasonable and probable grounds to believe that he has committed the offence of operating a motor vehicle in the public streets with alcohol in his blood more than the allowable statutory limit. And it is

at that stage, and that stage only, that he is required to give the right to counsel before the person is taken off to the station to be given the breathalyser test. He must have the right to counsel at that time.

¶ 10 And the Charter of Rights is quite clear on that issue. Section 10 states in part:

> Everyone has the right on arrest or detention,
>
> ...
>
> (b) to retain and instruct counsel without delay and to be informed of that right;
>
> ...

¶ 11 In this case, the officer does not require the appellant to go off to the station with him to perform a breathalyser test because he did not fail the test, but it showed - according to the device - some level of alcohol between 0.5 milligrams of alcohol per 100 millilitres of blood and 99 milligrams of alcohol to 100 millilitres of blood. And so he did two things. One, having been satisfied that he was a G-2 driver, and the regulations require that G-2 drivers must have zero alcohol in their blood, he charged him with the offence. And two, he suspended his licence for a period of 12 hours.

¶ 12 The case of R. v. Milne quoted extensively from R. v. Talbourdet (1984), 32 Sask. R. 5, [1984] 3 W.W.R. 525, 9 D.L.R. (4th) 406, 8 C.R.R. 82, 12 C.C.C. (3d) 173, 39 C.R. (3d) 210, 27 M.V.R. 46 (Sask. C.A.), from Appeals Justice Stuart John Cameron's judgment in the Saskatchewan Court of Appeal, in which he said at page 180 [C.C.C.]:

> For perfectly obvious reasons it is a crime in Canada and elsewhere to drive a motor vehicle while one's ability to do so is impaired by alcohol. And everyone whose blood-alcohol level exceeds 80 mg. of alcohol in 100 ml. of blood is now reasonably regarded by the criminal law of Canada to be thus impaired. To provide for the effective enforcement of this law, Parliament has justifiably empowered Canada's peace officers, whenever they have "reasonable and probable grounds" to believe that a person is breaking the law, to demand of that person that he or she submit to a breathalyser test. But often a person's blood-alcohol level will exceed the legal limit without that fact being obvious. A peace officer may well suspect a person of committing an offence - there may be a distinct odour of alcohol - but, having regard for the fact that ours is a free society, the law requires that there be more than mere "suspicion" before a police officer can require a person to submit to a breathalyser test; he has to have "reasonable and probable grounds" to do so.
>
> And this, of course, is where the roadside screening device comes into the picture. It is an investigative tool. Its purpose is to resolve the doubt, which will often exist between "suspicion" on the one hand and "reasonable and probable ground" on the other. When a policeman finds himself in that grey area between suspecting that an offence of this kind is being committed, and having reasonable and probable grounds for believing it is being committed, he may, providing there is good reason for his suspicion, ask the driver to clarify the position by submitting to a preliminary test conducted by means of a roadside screening device. This is a minor inconvenience and the person upon whom such a demand for clarification has been made runs no risk of being found guilty of any offence by submitting to the test. If he passes the test, he is free to go on his way; if he fails it then, of course, there are reasonable and probable grounds to believe that he may be guilty of an

> offence, and, in that event, a peace officer may make a further demand of him, namely, that he submit to a more definitive test by means of a breathalyser machine. And at that stage, he has a right to consult a lawyer ...

¶ 13 In this case, the right to consult the lawyer does not arise until after arrest. Mr. Higgins submits that, nevertheless, the screening device test must not be used in evidence to show anything. Now, section 48.1 of the Highway Traffic Act determines, in my opinion, the issue on this matter.

¶ 14 Subsection 48.1(2) states this:

> (2) Where a novice driver has been brought to a stop by a police officer under the authority of this Act and has provided a sample of breath under section 48 which, on analysis, registers "Pass", but the police officer reasonably suspects that the novice driver has alcohol in his or her body, the police officer may, for the purposes of determining compliance with the regulations respecting novice drivers, demand that the novice driver provide within a reasonable time such a sample of breath as, in the opinion of the police officer, is necessary to enable a proper analysis of the breath to be made by means of a provincially approved screening device and, where necessary, to accompany the police officer for the purpose of enabling such a sample of breath to be taken.

Then subsection 48.1(6) says this:

> (6) Where an analysis of the breath of the novice driver under subsection (3) or (4) registers "Warn", "Alert" or "Presence of Alcohol", the novice driver may require a further analysis to be performed in the manner provided in subsection 48(3), in which case the result obtained on the further analysis governs and any suspension resulting from an analysis under subsection (3) or (4) continues or terminates accordingly.

¶ 15 Subsection 48.1(2) gives the officer the right to demand a screening device test. If there is a presence of alcohol in his blood - up to that time the right of counsel does not arise - if there is a presence of alcohol in the blood but he is not over 80 so that he cannot be charged with an over-80 offence, normally his licence would be suspended but, if he is a G-2 driver, then under subsection (6), he then has the right to say, "I want another test", because, as was pointed out by Mr. Higgins, he may simply have straight alcohol in his mouth, washed his mouth out with it, and therefore really does not have it in his body, in his blood. He has the right to demand that he be taken off to the station for a proper analysis to see whether or not there is alcohol in his blood.

¶ 16 But there is nothing that I can find that requires the police officer to make the demand and take him off to the station. So I do not see how the right to counsel, with respect, arises before use of the screening device test as evidenced in this case.

¶ 17 The test so far as the officer is concerned, registered an "A". It shows that there is - it could have been a little bit of alcohol or up to 99 milligrams of alcohol in his blood. The legislation says that, if you are a G-2 driver, absolutely no alcohol. Not even point zero five. And on that basis, the application fails and this ground of appeal fails.

¶ 18 **THE COURT**: Now, you were saying that there is another argument?

¶ 19 Mr. McDONNELL: That's correct, Your Honour. And during the recess, Mr. Higgins and I - Mr. Higgins and I expect that it will be a rather lengthy argument once again, and we're going to propose to the court this time, if the court's willing to entertain it, that we adjourn the remainder of this appeal to a date in the future. That Mr. Higgins and I submit to the court written factums and that, on the return date - subject to Your Honour's approval - we have a return to the appeal court, to be traversed to a court where you're sitting where you can either give a written judgment or an oral judgment that point in time.

¶ 20 **THE COURT**: So you have a date proposed or what?

¶ 21 Mr. McDONNELL: We've discussed it subject, of course, to Your Honour's schedule. The date for the return in this matter of May the 10th in the year 2001 at this courtroom, 102 court, 9:30 in the morning. And what we discussed was that Mr. Higgins, being the appellant, would have his written factum provided to myself by March the 1st - which is a Thursday. I would respond in kind to Mr. Higgins by April the 2nd, Mr. Higgins would give to me two copies, one for the court and, on April the 2nd, I'll file his second copy as well as my copy for the court's consideration.

¶ 22 **THE COURT**: Okay. You by what date, April?

¶ 23 Mr. McDONNELL: Myself, I should file by Monday, April the 2nd. So I'd give a copy to Mr. Higgins and then give copies to the court at that time.

¶ 24 **THE COURT**: All right. Are you clear with the trial co-ordinator that May 10th?

¶ 25 Mr. McDONNELL: No.

¶ 26 **THE COURT**: ... date by any chance?

¶ 27 Mr. McDONNELL: No, I ...

¶ 28 **THE COURT**: Okay. Because I may well be here. Okay, leave it with May 10th.

¶ 29 Mr. McDONNELL: So is that agreeable to Your Honour then?

¶ 30 **THE COURT**: Yes, that's fine.

¶ 31 Mr. McDONNELL: Thank you.

¶ 32 Mr. HIGGINS: Certainly cut down today anyway.

¶ 33 **THE COURT**: Hm?

¶ 34 Mr. HIGGINS: It'll certainly cut down today. There's still some people waiting.

¶ 35 **THE COURT**: Yes.

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